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Supreme Court, U.S.
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No.

In the Supreme Court of the United States

GUIDO A. PRONSOLINO AND BETTY J. PRONSOLINO, AS TRUSTEES FOR GUIDO A. PRONSOLINO AND BETTY J. PRONSOLINO TRUST; AMERICAN FARM BUREAU FEDERATION; CALIFORNIA FARM BUREAU FEDERATION; MENDOCINO COUNTY FARM BUREAU,

Petitioners,

v.

WAYNE NASTRI, REGIONAL ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY REGION 9; CHRISTIE WHITMAN, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY; U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 303(d)(1) of the Clean Water Act, 33 U.S.C. § 1313(d)(1), requires each State to identify those waters within its boundaries for which specified "effluent limitations * * * are not stringent enough to implement any water quality standard applicable to such waters," and to establish total maximum daily loads ("TMDLs") of pollutants for those waters. Although effluent limitations are by definition applicable only to waters impaired by point sources, the Environmental Protection Agency ("EPA") requires each State to identify and establish TMDLs for *all* its waters not meeting water quality standards, including waters not impaired by point sources and thus not subject to effluent limitations at all. On that basis, EPA imposed TMDLs on numerous California waters impaired only by nonpoint sources. The Ninth Circuit, before analyzing the meaning of the statutory provision, held that EPA's construction was entitled to *Chevron* deference. The questions presented are:

1. Whether § 303(d)(1) requires a State to identify all sub-standard waters within its boundaries, including those impaired only by nonpoint sources, and establish TMDLs for those waters.

2. Whether the court below violated this Court's precedents by deferring to EPA's construction of § 303(d)(1) before analyzing the meaning of that provision.

3. Whether permitting EPA to establish TMDLs for waters impaired only by nonpoint sources and thereby impose corresponding land use controls constitutes an impermissible federal intrusion into a core State function without a clear statement from Congress.

RULE 29.6 STATEMENT

None of the petitioners has a parent corporation or a non-wholly owned subsidiary, and no publicly held corporation owns 10% or more of any petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Guido A. Pronsolino and Betty J. Pronsolino, as Trustees for the Guido A. Pronsolino and Betty J. Pronsolino Trust; American Farm Bureau Federation; California Farm Bureau Federation; and Mendocino County Farm Bureau, respectfully petition for a writ of certiorari to review the judgment of the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-31a) is reported at 291 F.3d 1123. The order of the court of appeals denying petitioners' petition for rehearing or rehearing en banc (App., *infra*, 32a) is unreported. The opinion of the district court (App., *infra*, 33a-71a) is reported at 91 F. Supp. 2d 1337.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 2002. Petitioners' timely petition for rehearing was denied on October 9, 2002. On December 20, 2002, Justice O'Connor granted an extension of time to file this petition to February 6, 2003. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d), is set forth at App., *infra*, 72a-74a.

STATEMENT

Introduction. This case raises a critical question under an important federal regulatory statute, the Clean Water Act ("CWA"). The 1972 legislation initiating the CWA sought to "restore and maintain the * * * the integrity of the Nation's waters" and provided a variety of mechanisms allocated to the Federal government and the States to achieve that purpose. The States were to address "nonpoint source"

pollution, such as agricultural run-off, through regional land and water use plans. The Federal government was to regulate "point source" pollution, that is, discharges from discrete conveyances, primarily through technology-based effluent limitations. The 1972 legislation called for increasingly stringent effluent limitations where necessary to achieve water quality goals. The statutory mechanism for calculating those more stringent limits is a "total maximum daily load" ("TMDL"). A TMDL represents the maximum amount (or "load") of a specified pollutant that can be added to a water body without reducing water quality below the applicable standard.

The question at issue is whether the Environmental Protection Agency ("EPA") may require the States to identify and develop TMDLs for waters impaired only by nonpoint sources. The court below said yes even though the statutory text says no. The Ninth Circuit accomplished that feat by deciding to defer to EPA's construction without first determining whether the statute itself answered the question.

In addition to flouting the statutory text and established deference law, the decision below overthrows Congress's careful allocation of responsibilities between the Federal and State governments in the fight against water pollution. Congress assigned EPA a primary role in addressing point source pollution. Recognizing that addressing nonpoint source pollution requires controls over local land uses, Congress left that task to the States, with the role of the Federal government limited to providing guidance. By authorizing EPA to establish TMDLs for waters impaired only by nonpoint sources, the Ninth Circuit has impermissibly authorized federal intrusion into a core State function. That decision will force the States to spend hundreds of millions of dollars to establish tens of thousands of TMDLs over the next decade and already is forcing private landowners to spend vast sums to adhere to EPA's unilaterally imposed mandates. Prompt intervention by this

Court is needed to prevent this waste of public and private resources and to ensure that EPA respects the limits on its regulatory powers as prescribed by Congress.

Statutory Framework. The Clean Water Act originated in the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816 (1972).[1] The 1972 Act required the adoption of "effluent limitations," quantitative restrictions on pollutant discharges, for "all point sources." 33 U.S.C. §§ 1311(e), 1362(11). A "point source" is a "discernible, confined and discrete conveyance," such as a pipe. *Id.* § 1362(14). The Act provided for permits incorporating appropriate effluent limitations and authorized EPA to oversee the permit program. *Id.* §§ 1311, 1342. In Section 208 of the 1972 Act, Congress assigned the task of addressing nonpoint source pollution to the States through the development of regional waste treatment management plans. 33 U.S.C. § 1288. Section 303 addressed water quality standards, with subsections (a), (b), and (c) giving the States primary responsibility for establishing and modifying such standards. 33 U.S.C. §§ 1313(a), 1313(b), 1313(c). Section 303(d) delineates the steps to be taken for waters not compliant with those standards.

Section 303(d)(1)(A) is the primary provision at issue here. It requires the States to "identify those waters within its boundaries for which the effluent limitations required by section 301(b)(1)(A) and section 301(b)(1)(B) are not stringent enough to implement any water quality standard applicable to such waters." 33 U.S.C. § 1313(d)(1)(A). The States are then to establish TMDLs for those waters. *Id.* § 1313(d)(1)(C). Upon EPA approval, the State is to incorporate those TMDLs into its "continuing planning

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[1] Other components of the CWA include the 1977 amendments, 91 Stat. 1566, and the Water Quality Act of 1987, 101 Stat. 7. The CWA is codified at 33 U.S.C. § 1251 et seq.

process." If EPA disapproves either the State's list of identified waters or its TMDLs, it may itself identify such waters and establish appropriate TMDLs. *Id.* § 1313(d)(2), (e). For waters not on the § 303(d)(1)(A) list, States are to "estimate" TMDLs for informational purposes. *Id.* § 1313(d)(3). The States need not seek EPA approval for these estimated TMDLs. *Ibid.*

Factual Background. For two decades after the 1972 legislation was enacted, EPA did not construe § 303(d)(1) as applicable to waters impaired only by nonpoint sources. After changing its position in the early 1990s, EPA disapproved California's § 303(d)(1)(A) list of identified waters because it did not include water bodies impaired solely by nonpoint source pollution. After California refused to add those water bodies, EPA established its own section 303(d)(1)(A) list for California and subsequently established TMDLs for 16 water bodies impaired only by nonpoint source pollution.

EPA's 1998 TMDL for one of those water bodies, the Garcia River, required a 60% reduction in sediment loadings from such nonpoint sources as timber harvesting and farming and required California to implement this mandate into its water quality management and basin plans. In May 1998, an EPA official publicly told California officials that "we do expect implementation of non-point source TMDL's [in] every single timber harvest plan [and] Basin Plan" and made clear that noncompliance would be punished: "Now, what we do to get you to do that through all sorts of nasty little tricks with grants and such, I don't know, but it's not a place I want to go and I'm sure it's not a place you want to go." ER-86 ¶¶ 21-22.[2] To avoid these consequences, California began

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[2] "E.R." refers to the Excerpts of Record filed with the appeal of this matter to the Ninth Circuit.

requiring applicants for timber harvest and management plans to conform their land uses to EPA's TMDL. *Id.* ¶ 19.

The impact on landowners was dramatic. Petitioners Guido and Betty Pronsolino had purchased 800 acres of land by the Garcia River in 1960. In 1998, after investing substantial resources to regenerate depleted forests over almost four decades, the Pronsolinos obtained a state permit to begin harvesting their timber—but subject to onerous new obligations to satisfy EPA's TMDL. Among other things, the Pronsolinos had to suspend harvesting between November and April and during rainy periods the rest of the year, retain substantial numbers of conifer trees, limit road construction, and cease using certain skid trails. The estimated cost of complying with just the conifer tree requirement was $750,000. ER-86 ¶¶ 27-35. A neighboring landowner faced additional costs of over $10 million from the new EPA mandates. *Id.* ¶¶ 45-51.

In April 1999, petitioners sued EPA and EPA officials on the ground that § 303(d)(1) does not require the States to identify and establish TMDLs for waters that are free of point source pollution. The district court granted EPA's motion for summary judgment, and the Ninth Circuit affirmed.

The Ninth Circuit first ruled that EPA's construction of § 303(d)(1) is entitled to *Chevron* deference. App., *infra*, 16a. The court did so prior to determining whether the meaning of that provision is clear and despite EPA's failure to adopt any "currently-operative" regulation embodying that construction. *Id.* at 14a. The court based its deference ruling on EPA's own interpretation of related regulations that it had adopted and on EPA's general authority to interpret the Clean Water Act. *Id.* at 12a-20a. Only then did the court turn to the statutory text. It construed § 303(d)(1)(A), which by its terms requires the States to identify only those waters for which specified effluent limitations are "not stringent enough" to achieve water quality standards, to require the

States to identify *all* waters not compliant with water quality standards. *Id.* at 21a-22a. The court also held that upholding EPA does not authorize any intrusion on State authority over land use controls because "California chose both *if* and *how* it would implement the Garcia River TMDL." *Id.* at 30a (emphasis in original).

REASONS FOR GRANTING THE PETITION

By the time the court below got to the text of § 303(d)(1), it already had deferred to EPA's construction of it. This remarkable mode of proceeding stands this Court's *Chevron* doctrine on its head. Under *Chevron*, a statute must be ambiguous before deference may be accorded to an agency's construction, and only then if the agency's construction is reasonable. *Chevron U.S.A., Inc.* v. *NRDC*, 467 U.S. 837, 842-845 (1984). There is nothing ambiguous about § 303(d)(1). It does not require the identification of all impaired waters in a State for the purpose of establishing TMDLs. To the contrary, it expressly restricts the waters to be identified to point-source impaired waters for which two specific types of effluent limitations are "not stringent enough" to achieve water quality standards. EPA and the court below removed this restriction to *some waters* from the statute and replaced it with *all waters*. By doing so, they disregarded both the plain textual meaning and this Court's decisions recognizing that Congress left regulation of nonpoint source pollution to the States.

Controlling nonpoint source pollution necessarily entails regulation of private land uses. Congress has not authorized federal regulation of such a core State and local function, much less provided the "clear statement" of such an intent that this Court's precedents require. To the contrary, Congress clearly stated its policy "to recognize, preserve, and protect the primary responsibilities and rights of States * * * to plan the development and use [of] land and water resources." 33 U.S.C. § 1251(b). Nevertheless, the decision

below grants EPA authority to impose burdensome regulatory mandates on the States to control nonpoint source pollution. The land use restrictions in EPA's TMDLs are indistinguishable in effect from the effluent limitations that Congress made applicable only to point sources. Review by this Court is required to clarify critical questions regarding the administration of—and the allocation of federal and state responsibilities under—an important federal regulatory statute.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS BARRING DEFERENCE TO AN AGENCY'S STATUTORY CONSTRUCTION WHERE THE TEXTUAL MEANING IS CLEAR.

A. The Ninth Circuit Impermissibly Determined That It Must Defer To EPA Before Analyzing The Meaning Of The Statute.

Contrary to this Court's precedents, the Ninth Circuit *began* the analysis section of its opinion, entitled "Deference to the EPA," by inquiring into "the degree of deference" owed to EPA. App., *infra*, 12a. Relying on EPA's construction of its own regulations to authorize federal imposition of TMDLs on waters impaired only by nonpoint sources, the court concluded that "EPA's interpretation is entitled to *Chevron* deference" and alternatively to *Skidmore/Mead* deference. *Id.* at 16a-17a. Only then did it turn to the text of § 303(d)(1) itself.

The Ninth Circuit got it precisely backwards. Courts must "first ask" whether the statutory meaning is clear before considering whether deference is appropriate. *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000); accord *Solid Waste Agency* v. *United States Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001). An independent analysis must precede the deference inquiry because courts may not even "contemplate" deference where the statute is

unambiguous on the point at issue. *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 462 (2002). Thus, "the starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The decision below—that § 303(d)(1) mandates identification of *all* state waters not meeting water quality standards in order to establish TMDLs (App., *infra*, 21a-22a)—cannot be reconciled with the plain language of that statutory provision.

B. By Its Plain Terms, § 303(d)(1) Applies Only To Sub-Standard Waters Polluted By Point Sources.

Section 303(d)(1) does not require a state to identify *all* of its sub-standard waters for purposes of mandatory TMDLs. Instead, each state must identify only those waters "for which the *effluent limitations* required by section 301(b)(1)(A) and section 301(b)(1)(B) *are not stringent enough* to implement any water quality standard applicable to such waters." § 303(d)(1)(A) (emphasis added). The TMDL requirement applies only to that sub-class of a state's sub-standard waters. § 303(d)(1)(C). Because effluent limitations by definition apply only to waters that are impaired by point sources (33 U.S.C. § 1362(11)), the waters to be identified must be limited to those impaired by point sources. Waters impaired only by nonpoint sources cannot be among the waters for which effluent limitations are "not stringent enough" because they are not subject to effluent limitations at all.

By construing this provision to require the identification of *all* impaired waters within a state, the court below read the "effluent limitations * * * not stringent enough" limitation out of the statute. *Without* that limitation, each state plainly would have to identify all impaired waters within its boundaries. Yet, according to the court below, *with* that limitation each state still must identify all impaired waters within its boundaries. The Ninth Circuit's view cannot be

right because it would make the "effluent limitations * * * not stringent enough" language completely superfluous. See *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (refusing to construe statutory provision "precisely the same" as if it did not contain limiting term); *United States* v. *Alaska*, 521 U.S. 1, 59 (1997) (courts must "avoid an interpretation of a statute that renders some words altogether redundant"); *Solid Waste Agency*, 531 U.S. at 172 (rejecting argument that word "navigable" in Clean Water Act had no "independent significance").

Congress could have required the States to identify "waters," "all waters," "waters not meeting water quality standards," or "waters impaired by point and nonpoint sources" for purposes of establishing TMDLs. Instead, it designated only waters for which the effluent limitations "required by section 301(b)(1)(A) and section 301(b)(1)(B) are not stringent enough." The effluent limitations "required by section 301(b)(1)(A) and section 301(b)(1)(B)" involve relatively modest treatment requirements applicable to all point sources, regardless of the quality of the receiving water body. But in some instances these basic technology-derived limits will not suffice. For example, the total pollution load might cause a river with a multiplicity of point sources to fall short of its applicable water quality standard, even though each individual source met its limit. In that case, the TMDL would provide a basis to calculate the "more stringent limitation * * * necessary to meet water quality standards." 33 U.S.C. § 1311(b)(1)(C). Thus, the plain language of § 303(d)(1) shows that Congress prescribed mandatory TMDLs to help clean up point source impaired waters for which existing effluent controls were not stringent enough.

The statutory text cannot plausibly be stretched to apply to waters impaired only by nonpoint sources, which are not subject to any effluent limitations. EPA's construction, accepted by the court below, departs from this plain meaning. It makes sub-standard waters for which effluent limitations

are "not stringent enough" the equivalent of all sub-standard waters, even waters with no point source pollution and thus not subject to any effluent limitation. That construction departs not only from the plain text but from plain logic. No reasonable doctor would understand a hospital rule that patients be treated with Medicine B, where Medicine A is "not stringent enough" to cure them, to require use of Medicine B for an ailment to which Medicine A was never applicable at all.

The court below thought it could avoid this problem and uphold EPA's construction by recharacterizing "not stringent enough" as not "adequate" or not "sufficient" or not "thoroughgoing enough." App., *infra*, 21a. But any such revision, even if appropriate, would be unavailing because it does not cure the defect in EPA's construction. If Congress had intended identification of *all* substandard waters, it would not have provided for identification of only *some* of those waters. See *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 122 S. Ct. 708, 712 (2002) (the term "equitable relief" in statute "must mean *something* less than *all* relief") (emphasis in original); *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 113 (2001) (statutory exemption did not apply to all employees where it specifically referenced specific class of employees). Even if not "adequate" or not "sufficient" or not "thoroughgoing enough" means the same as not "stringent enough," EPA's construction cannot cure that defect.

The court below also opined that "effluent limitations * * * not stringent enough" meant only that the 1972 Congress intended to have EPA employ TMDLs at some unspecified time in the future. App., *infra*, 23a. That hypothesis is refuted by other portions of the 1972 legislation, which required EPA to identify pollutants "suitable for" TMDL measurement by October 1973 (§ 304(a)(2)(D)) and required the States to submit initial lists of waters and TMDL calculations by April 1974

(§ 303(d)(2). And whatever Congress's intent as to the timing of TMDL deployment, that has nothing to do with *which* waters must be identified for that purpose.

The point source limitation in § 303(d)(1) stands in marked contrast to the omission from that provision of any reference to nonpoint sources. See 2A N. Singer, STATUTES AND STATUTORY CONSTRUCTION § 47.23, at 305-07 (6th ed. 2000) (statute's specification of one category creates "an inference that all omissions should be understood as exclusions"). Indeed, where Congress did intend to address nonpoint source pollution in the 1972 Act, it did so expressly.[3] "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Brown* v. *Gardner*, 513 U.S. 115, 120 (1994). The lack of any reference to nonpoint source pollution confirms the plain text meaning of § 303(d)(1)—that Congress intended only waters impaired by point sources to be subject to mandatory TMDLs.

C. The Plain Text Meaning Of § 303(d)(1) Is Confirmed By The Statutory Structure, Legislative History, and Statutory Purpose.

The structure of the Clean Water Act confirms that § 303(d)(1) is not directed to waters impaired only by

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[3] See § 304(f), 33 U.S.C. § 1314(f) (requiring EPA to issue "guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants"); § 305(b)(1)(E), 33 U.S.C. § 1315(b)(1)(E) (requiring states to provide EPA with "a description of the nature and extent of nonpoint sources of pollutants"); § 208(b)(2)(F), 33 U.S.C. § 1288(b)(2)(F) (requiring regional waste treatment management plans to include processes to identify "agriculturally and silviculturally related nonpoint sources of pollution").

nonpoint sources. Three provisions, §§ 303(d)(3), 208, and 319, are particularly significant.

Section 303(d)(3) provides for a wholly separate and distinct TMDL process for waters not described in § 303(d)(1), including waters impaired only by nonpoint sources. It provides that states are to "estimate" TMDLs for waters not on the § 303(d)(1) list "[f]or the specific purpose of developing information." 33 U.S.C. § 1313(d)(3). These estimated, informational TMDLs, which need not be approved and may not be prescribed by EPA (§ 303(d)(2)), allow for preventative planning against the risk of point-source impairment. For example, if a manufacturer seeks to build a factory on a waterway impaired only by nonpoint source pollution, § 303(d)(3) TMDLs would provide information that would aid in establishing the scope of needed effluent limitations. The court below failed to account for this important distinction between mandatory TMDLs for waters impaired by point sources and estimated, informational TMDLs to prevent future point source impairment of waters presently impaired only by nonpoint sources, such as the Garcia River.

Congress designed § 208 of the 1972 Act to address nonpoint source pollution. That provision calls for state and local bodies to develop regional waste treatment management plans to identify and control, *inter alia*, "agriculturally and silviculturally related nonpoint sources of pollution." 33 U.S.C. § 1288(b)(2)(F). As the D.C. Circuit explained, the 1972 Congress relied on § 208 to address water pollution in "agricultural and forest areas." *NRDC* v. *Costle*, 564 F.2d 573, 578 (D.C. Cir. 1977). See also 2 F. Grad, TREATISE ON ENVIRONMENTAL LAW § 3.03[4][n], at 3-216.7 (2000) (§ 208 was an "early attempt to deal with nonpoint sources under the Federal Water Pollution Control Act"). Section 208 shows that the 1972 Congress relied on the States to address nonpoint source pollution, limiting the role of the Federal government to guidance on developing the regional

management plans. Nothing in the 1972 Act indicates that Congress intended federally imposed TMDLs to supplement § 208 management plans in addressing nonpoint source pollution.

In fact, Congress waited until 1987 to address nonpoint source pollution with measures stronger than the management plans set forth in § 208. It did so by enacting a new § 319 of the Act, entitled "Nonpoint source management programs." 33 U.S.C. § 1329. Section 319(a)(1) is the mirror image of § 303(d)(1), modifying the latter's requirements to make them applicable in the nonpoint source context. Whereas § 303(d)(1)(A) requires identification of waters for which the specified controls over point source pollution are not stringent enough to achieve water quality standards, § 319(a)(1)(A) requires identification of waters for which "additional action to control nonpoint sources of pollution" is needed. Whereas § 303(d)(1)(C) requires establishment of TMDLs for particular pollutants that prevent the identified waters from achieving water quality standards, § 319(a)(1)(C) requires identification of "best management practices and measures" to control "nonpoint sources" and reduce the levels of particular pollutants "to the maximum extent practicable."

If § 303(d)(1) already covered nonpoint source pollution, the 1987 Congress would have had no need to add these parallel provisions in § 319(a)(1). See *Kawaauhau* v. *Geiger*, 523 U.S. 57, 62 (1998) (rejecting "interpretation of a congressional enactment which renders superfluous another portion of that same law"); *Stone* v. *INS*, 514 U.S. 386, 397 (1995) (Congress would have had "no reason" to enact amendment if it simply reprised "already existing" provision). EPA and the court below sought to overcome this obstacle to their desired result by urging that Congress merely supplemented § 303(d)(1) TMDLs with overlapping § 319(a)(1) best management practices to address nonpoint source pollution. See App., *infra*, 27a. But just as two

parallel lines never overlap, the parallelism between §§ 303(d)(1) and 319(a)(1) indicates that they were directed to two distinct purposes. The 1987 Congress saw the need for the States to take stronger measures to address nonpoint source pollution than did the 1972 Congress. Without ever indicating that it considered § 303(d)(1) TMDLs to be an available tool for that purpose, it enacted a comparable provision directed to nonpoint source pollution, utilizing best management practices and similar state and local programs. Even if the court below could validly ignore the plain text of § 303(d)(1) as written by the 1972 Congress, there was no valid reason for it to show more deference to EPA's current construction of that provision than to the construction of the 1987 Congress.

The plain text meaning of § 303(d)(1)—that Congress intended TMDLs to apply only to waters impaired by point sources and to pave the way for more stringent effluent controls—is confirmed by unambiguous legislative history. As the House Report explained, "*point sources* could be required to meet a more stringent effluent limitation consistent with water quality standards of the receiving waters if the effluent limitations set pursuant to subsection (b)(1)(A) and subsection (b)(1)(B) of section 301 are inadequate to meet those water quality standards. In this case a more stringent *effluent limitation* will be imposed." H.R. Rep. No. 92-911 (1972), reprinted in 1 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 753, 792 (1973) (emphasis added). See also *id.* at 788-789 ("if the sum of the discharges from *point sources* meeting such effluent limitations would preclude the meeting of water quality standards," TMDLs would require establishment of "more stringent *effluent limitations*") (emphasis added). Nowhere in the extensive Congressional reports and debates is there any suggestion that TMDLs were to be directed to nonpoint source pollution.

The reliance of the court below on the "broad goals" of the 1972 Act cannot overcome its plain text. See *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 261 (1993) ("statute's 'basic purpose'" is "inadequate to overcome the words of its text"); *Board of Gov. of Fed. Res. Sys.* v. *Dimension Fin. Corp.*, 474 U.S. 361, 373-374 (1986) (same). In any event, the primary goal of the 1972 Act was to eliminate or reduce point source pollution. Section 101(a) set forth six national policy goals, none directed to waters impaired only by nonpoint sources beyond the regional waste treatment provisions in § 208. It was not until § 319 was added in 1987—15 years after the TMDL provisions were enacted—that Congress established a "national policy that programs for the control of nonpoint sources of pollution be developed and implemented." 33 U.S.C. § 1251(a)(7). And even then, nonpoint sources were "not subject to any comprehensive regulatory structure, at least at the federal level." 2 Grad, *supra*, TREATISE ON ENVIRONMENTAL LAW § 3.03[4][n], at 3-216.

Congress's restriction of mandatory TMDLs to waters impaired by point source pollution not only was consistent with the purpose of the 1972 Act but sensible in light of the nature of TMDLs. Requiring precise, quantitative load allocations makes sense for point source pollution. Discharges from the end of a pipe can be controlled by technology, easily sampled and measured to determine compliance, and limited by the permit process. But that approach makes no sense at all in the context of nonpoint source pollution. The Garcia River TMDL, for example, focuses on sediment, most of which results from runoff after rainfall. ER 86 ¶ 12. Neither rainfall nor runoff occurs with the predictability and precision appropriate for quantitative TMDL controls. That is why the Clean Water Act provisions directed to nonpoint source pollution employ estimates and qualitative management programs to address that problem, and these only "to the extent feasible," and "to the maximum extent practicable." 33 U.S.C. §§ 1288, 1329. Using

mandatory TMDLs, new tools developed as part of the 1972 Act's focused effort to eradicate point source pollution, would be inconsistent with these feasibility and practicability constraints on the reduction of nonpoint source pollution.

In sum, if Congress had wanted to impose TMDLs on waters impaired only by nonpoint sources, it would have "legislate[d] to make that intention manifest." *EPA* v. *California*, 426 U.S. 200, 228 (1976). It did not do so in the 1972 Act and has not done so since, and neither EPA nor the Ninth Circuit may legislate in its stead. See *American Iron & Steel Inst.* v. *EPA*, 115 F.3d 979, 996 (D.C. Cir. 1997) (EPA "exceeded its authority when it sought to impose effluent limitations upon nonpoint-source discharges"). The eagerness of the court below to ratify EPA's expansion of § 303(d)(1) TMDLs to waters impaired only by nonpoint sources, which led it to determine the "degree of deference" owed to EPA before determining the meaning of the statutory text, manifested an open disdain for this Court's precedents.

D. EPA's Construction Of § 303(d)(1) Is Unreasonable.

Even if the meaning of § 303(d)(1) were ambiguous, the unreasonableness of EPA's construction precludes it from obtaining deference. See *Commissioner* v. *Engle*, 464 U.S. 206, 226 (1984) ("unreasonable" agency construction is "not entitled to deference"). The unreasonableness of reading § 303(d)(1)(A) as if it did not contain an express restriction on the waters to be identified is underscored by the fact that EPA did not articulate its current position until some two decades after § 303(d)(1) was enacted.

An agency's failure to enforce a provision for so long "strongly suggests that it did not read the statute as granting such power." *BankAmerica Corp.* v. *United States*, 462 U.S. 122, 131 (1983); accord *FPC* v. *Panhandle E. Pipe Line Co.*, 337 U.S. 498, 513 (1949). For more than 20 years after passage of the 1972 Act, EPA dealt with nonpoint source

pollution not through TMDLs but through advisory management planning under § 208 and, once the Act was amended in 1987, through nonpoint source identification and planning under § 319. Under interest group pressure to do more, EPA changed course in the 1990s and, without seeking Congressional approval, for the first time asserted its authority to impose TMDLs on the States as a means to address waters impaired only by nonpoint sources.

Following enactment of the 1972 Act, EPA viewed § 208 as the sole provision designed to control nonpoint source pollution. As the D.C. Circuit noted, "[i]n EPA's view, the Act divides the causes and control of water pollution into two categories, point sources of pollutants (regulated through the § 402 permit program) and nonpoint sources of pollution (regulated by the states through 'areawide waste treatment management plans' under § 208)." *National Wildlife Fed'n* v. *Gorsuch*, 693 F.2d 156, 165-166 (D.C. Cir. 1982). EPA maintained that position when it first adopted TMDL regulations in 1985. Those regulations did not refer to waters impaired only by nonpoint sources, and EPA's preface stated that "those waters not covered by this interpretation" are subject only to the informational and estimated TMDLs under section 303(d)(3). 50 Fed. Reg. 1774, 1775 (1985). As late as 1987, 15 years after § 303(d) was enacted, EPA issued a comprehensive guide to the States' role in addressing nonpoint source pollution which *did not even mention* TMDLs or § 303(d). EPA, *Nonpoint Source Guidance (1987)*, in CLEAN WATER DESKBOOK 173, 177 (1991).

EPA changed course in 1992, circulating an internal memorandum stating that the § 303(d)(1) TMDL process applied to waters impaired only by nonpoint sources. ER-91 Ex. 17, at 2. This change in position, which was never the subject of rulemaking or public comment, provided the backdrop for EPA's rejection of California's § 303(d)(1) list in 1992 and initiated the events leading to this litigation. See *United States* v. *Mead Corp.*, 533 U.S. 218, 231 (2001) (lack

of notice-and-comment weighs against deference to agency determination); *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000). EPA understood that its new position represented a significant departure from its prior construction. As it admitted in a 1997 memorandum, it had not previously provided guidance on "implementation of TMDLs for waters impaired only by nonpoint sources." ER-91 Ex. 7, at 5.

This history establishes that for two decades the agency charged with enforcing the Clean Water Act construed § 303(d)(1), in accordance with its plain meaning, as inapplicable to waters impaired only by nonpoint sources. Succumbing to outside pressure, EPA later bypassed Congress and unilaterally expanded the scope of § 303(d)(1). There is no reason to defer to EPA's redrafting of the statute to fit its current policy predilections. See *Solid Waste Agency*, 531 U.S. at 168 (rejecting agency's current position as inconsistent with its "original interpretation of the CWA"); *United States* v. *Leslie Salt Co.*, 350 U.S. 383, 396 (1956) (agency's "more recent ad hoc contention as to how the statute should be construed cannot stand" against "prior long-standing and consistent administrative interpretation").

EPA's policy shift was particularly unreasonable because it authorized federal encroachment upon a traditional state power, control over local land uses. See *infra*, Part II.B. An agency assertion that Congress intended such encroachment without a "clear indication" of such intent is unreasonable and not entitled to deference. *Solid Waste Agency*, 531 U.S. at 172-173.[4]

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[4] EPA's reading of § 303(d)(1) has been controversial even within federal administrative circles. In 1996, EPA formed an advisory committee on TMDL issues pursuant to the Federal Advisory Committee Act. After two years of meetings, the Committee could not reach agreement on "whether waters impacted only by nonpoint sources are to be listed under § 303(d)(1)(A), § 303(d)(3), or only under § 319" and thus it

II. THE NINTH CIRCUIT CONSTRUED AN IMPORTANT FEDERAL REGULATORY STATUTE IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

A. The 1972 Congress Was Focused On Reducing Point Source Pollution.

The decision below departs from this Court's decisions recognizing that the primary aim of the 1972 Act was to initiate Federal programs to reduce point source pollution, with reduction of nonpoint source pollution left to the States.

The 1972 Act has been universally understood to embody that allocation. See *Appalachian Power Co.* v. *Train*, 545 F.2d 1351, 1373 & n.68 (4th Cir. 1976) ("Congress consciously distinguished between point source and nonpoint source discharges, giving EPA authority under the Act to regulate only the former," with nonpoint sources subject "only to analysis, study, and suggestions"). As this Court has explained, the novel aspects of the 1972 Act focused on point source pollution. The Act introduced "two major changes" in the effort to abate and control water pollution—the imposition of "maximum 'effluent limitations' on 'point sources'" and the establishment of a permit system to achieve and enforce the "effluent limitations." *EPA* v. *California*, 426 U.S. 200, 204-205 (1976). Those changes, both involving "effluent limitations," were addressed only to point source

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"decided not to address these legal issues in its report." EPA, *Report of the Federal Advisory Committee on the Total Maximum Daily Load (TMDL) Program* 42 (July 1998). Another directly concerned federal agency, the U.S. Forest Service, objected to the application of § 303(d)(1) to nonpoint-source-impaired waters, stating that the provision "was written with point sources in mind" and that Congress passed § 319 "specifically to address nonpoint sources of pollution." See April 29, 1997 letter from Forest Service to EPA, quoted in Houck, THE CLEAN WATER ACT TMDL PROGRAM 61-62 (1999).

pollution. TMDLs, a newly designed tool to achieve water quality standards, were part of those changes and the fight against point source pollution. Congress intended water quality standards to serve as "a supplementary basis for effluent limitations * * * so that numerous *point sources*, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." *Id.* at 205 n.12 (emphasis added).

Consistent with that understanding, Congress designed TMDLs to enable the States and EPA to determine what further controls would be necessary to control point source pollution. Options included adopting more stringent effluent limitations to achieve water quality standards (see 33 U.S.C. § 1311(b)(1)(c)), limiting the activities of authorized point source polluters (see *PUD No. 1* v. *Washington Dep't of Ecology*, 511 U.S. 700, 712-713 (1994)), or denying or modifying point source permits (see 40 C.F.R. § 122.62 (a)). See *Environmental Defense Fund, Inc.* v. *Costle*, 657 F.2d 275, 294 (D.C. Cir. 1981) (TMDLs are "allocated by insertion into NPDES permits, among the various point source dischargers upon the stream segment").

Congress did not direct TMDLs to nonpoint source pollution, such as agricultural run-off, because by its very nature it is not subject to effluent controls, no matter how stringent. Moreover, at the time of enactment, Congress "had comparatively scant information concerning the origins of nonpoint source pollutants, their relative contribution to the overall water pollution problem, and the feasibility of controls. Additionally, there was a strong feeling that nonpoint source pollution is too highly dependent on local topographic, soil, and vegetative conditions to be successfully regulated through national limitations applicable to point source pollutants." J. Montgomery, *Control of Agricultural Water Pollution: A Continuing Regulatory*

Dilemma, 1976 U. Ill. L.F. 533, 539-540.[5] The 1972 Congress therefore focused the new legislation on effluent controls, permits, TMDLs, and other measures to address point source pollution. EPA's requirement that TMDLs be prepared for waters impaired only by nonpoint sources conflicts with this Court's recognition that Congress intended overall water quality standards to play but a "supplementary" role in the 1972 Act scheme.

B. Congress Allocated Responsibility Over Non-point Source Pollution To The States.

Congress's focus on the Federal government's role in reducing point source pollution was consistent with its understanding that the States would continue to bear responsibility for reducing nonpoint source pollution. As this Court has explained, "the Clean Water Act establishes distinct roles for the Federal and State Governments." *PUD No. 1*, 511 U.S. at 704. On the one hand, the Federal government regulates "technology-based limitations on individual discharges into the country's navigable waters from point sources." *Ibid.* On the other hand, the "States are responsible for enforcing water quality standards" on intrastate waters, which necessarily implicate nonpoint source pollution. *Id.* at 707.

That division of responsibility comports with historical practice and the differences between point source and

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[5] Montgomery's exhaustive article does not mention § 303(d) or the use of TMDLs as an option for controlling nonpoint source pollution. That omission is consistent with other authorities addressing nonpoint source pollution under the 1972 Act. See G. Gould, *Agriculture, Nonpoint Source Pollution, and Federal Law*, 23 U.C. Davis L. Rev. 461 (1990); D. Zaring, *Agriculture, Nonpoint Source Pollution, and Regulatory Control: The Clean Water Act's Bleak Present and Future*, 20 Harv. Envtl. L. Rev. 515 (1996).

nonpoint source pollution. The diffuse nature of nonpoint source pollution, such as runoff from farms, forests, and parking lots, requires that it be addressed through controls over private land use practices. See 117 Cong. Rec. 38825 (1971) (the only "effective way" to intercept and control runoff is through "land use control") (Sen. Muskie). As this Court long has recognized, land use regulation "is perhaps the quintessential state activity" (*FERC* v. *Mississippi*, 456 U.S. 742, 768 n.30 (1982)) and has been "traditionally performed" by state and local governments. *Hess* v. *Port Auth.*, 513 U.S. 30, 44 (1994). In fact, "the overwhelming majority of land-use management" is performed by local state subdivisions "through local government regulation." Zygmunt Plater et al., ENVIRONMENTAL LAW AND POLICY 1164 (2d ed. 1998); see also John Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 Harv. Envtl. L. Rev. 365, 386-410 (2002) (discussing broad array of land-use controls applied by local governments for environmental purposes).

Federal control of nonpoint source pollution necessarily impinges on the traditional core State function of controlling land uses. It "inevitably will require the development of controversial and entirely new land-use management techniques." R. Lazarus, *Nonpoint Source Pollution*, 2 Harv. Envtl. L. Rev. 176, 183 (1977). For example, as a result of the Garcia River TMDL's requirement that sediment loadings be reduced by 60%, petitioners Guido and Betty Pronsolino were forced, *inter alia*, to forgo harvesting on rainy days between May and October, harvesting many large conifer trees altogether, and using their own skid trails. ER-86 ¶¶ 11-12, 14-15, 32. Experts predict that the decision below will make EPA a "de facto land planning agency [that] can override all state decisions regarding natural resources industries or agriculture." Henry Stephens & Monica Dias, *TMDLs for Nonpoint Sources in Kentucky: The Potential Impact of* Pronsolino v. Marcus, 16 J. Nat. Resources &

Envt'l L. 1, 29 (2002). The Ninth Circuit nonetheless acquiesced in EPA's assertion that it may impose such onerous land use obligations on the States and private landowners.

The decision below cannot be reconciled with this Court's repeated admonitions in Clean Water Act cases that such a "heavy regulatory burden on the States" should not be attributed to Congress without solid "textual support" and, indeed, a "clear statement" from Congress. *PUD No. 1*, 511 U.S. at 718; *Solid Waste Agency*, 531 U.S. at 174. As demonstrated in Part I above, Congress provided no "clear statement" or any textual support at all for the imposition of § 303(d)(1) TMDLs, with their burdensome land use mandates, on the States. Rather, as this Court recently put it, "Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States to plan the development and use of land and water resources.'" *Solid Waste Agency*, 531 U.S. at 174, quoting 33 U.S.C. § 1251(b). Thus, an agency's interpretation of the Clean Water Act that results in a "significant impingement of the States' traditional and primary power over land and water use" cannot stand. *Ibid.* Instead, courts must "read the statute as written" to avoid such a result. *Ibid.*[6]

The district court recognized the "practical reality" that implementing TMDLs for waters impaired only by nonpoint sources could force the States to "knuckle under to coercive threats by EPA," but it opined that "this is not direct federal

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[6] The fact that § 303(d)(1)(A) does not employ the terms "point sources and nonpoint sources as such" (App., *infra*, 24a) does not overcome the need for a "clear statement" from Congress. Not only do the provision's references to "effluent limitations" apply only to point sources, as demonstrated above, but "[m]ere silence" is insufficient "to establish a clear and manifest purpose to pre-empt local authority." *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 122 S. Ct. 2226, 2232 (2002).

regulation." App., *infra*, 69a. The court of appeals agreed, calling TMDLs mere "informational tools that *allow* the states" to achieve water quality standards. App., *infra*, 9a (emphasis added); see also *id.* at 30a. The lower courts' dismissal of the coercive impact of mandatory TMDLs rings hollow in light of EPA's strong-arm behavior, as reflected in the record of this case. EPA's Garcia River TMDL assigned and allocated numeric maximum loads with respect to specific land uses. EPA *required* California to list all sub-standard waters impaired only by nonpoint source pollution, *imposed* a TMDL on the Garcia River that expressly *required* California to incorporate specific sediment loadings into its State Water Quality Management Plan, and *required* California to implement EPA's TMDL through additional restrictions on timber harvesting. See ER-91 Ex. 1, at 6-7, 58. EPA's misreading of § 303(d)(1) has thrust it squarely into the local land use arena, effectively forcing states to adopt EPA-directed land use measures. Even if EPA officials do not actually stand on the affected land and supervise its use, threatening state officials with "all sorts of nasty little tricks" achieves the same result. See ER-86 ¶ 21.

Indeed, EPA's construction of § 303(d)(1) authorizes so substantial an intrusion into this area of traditional state concern as to raise severe constitutional questions. See *Jones* v. *United States*, 529 U.S. 848, 858 (2000) (narrowly construing federal statute to avoid infringing on a "traditional state concern"); *Solid Waste Agency*, 531 U.S. at 173 (same). The Constitution does not permit the federal government to "regulate state governments' regulation" of local land uses, as EPA seeks to do. *New York* v. *United States*, 505 U.S. 144, 166 (1992). Construing § 303(d)(1) not to mandate TMDLs for waters impaired only by nonpoint sources would avoid both upsetting the federalist balance prescribed by Congress in the Clean Water Act and crossing the constitutional line.

III. WHETHER CONGRESS AUTHORIZED EPA TO REGULATE WATERS IMPAIRED ONLY BY NONPOINT SOURCES IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE PROMPTLY SETTLED BY THIS COURT.

Although no other court of appeals has ruled on the precise question at issue—whether § 303(d)(1) requires the identification and establishment of TMDLs for waters impaired only by nonpoint sources—there are compelling reasons why this Court should promptly decide this important question of federal law.[7]

Regardless of any inter-circuit conflict, this Court has granted certiorari in light of a "clear misreading by the lower courts of the applicable and important federal statute" (*Stevens* v. *Dep't of Treasury*, 500 U.S. 1, 5 (1991)); to consider "an unresolved question under an important federal statute" (*Reliance Elec. Co.* v. *Emerson Elec. Co.*, 404 U.S. 418, 421-422 (1972)); to review "questions of importance in the administration of" an important federal regulatory statute (*United States* v. *Ruzicka*, 329 U.S. 287, 288 (1946)); because of "the importance of the issue for the agricultural community" (*National Broiler Marketing Ass'n* v. *United States*, 436 U.S. 816, 820 (1978)); because of "the importance of the question presented to the States and affected individuals" (*Olmstead* v. *Zimring*, 527 U.S. 581, 596 (1999)); and to review whether an agency exceeded its

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[7] A recent ruling by a state trial court directly conflicts with the decision below. In *Hawes* v. *Oregon*, No. 00-198, slip. op. 8 (Or. Cir. Ct., Baker County, Dec. 9, 2002), the court ruled that "the intent of Congress was to require the implementation of TMDLs on point sources of pollution but not on nonpoint sources." It therefore held that Oregon acted beyond its authority in executing an agreement with EPA "concerning the implementation of TMDLs for nonpoint sources of pollution." Twelve copies of that ruling have been lodged with the Clerk.

authority by imposing regulatory mandates in conflict with the governing statute. *Public Lands Council* v. *Babbitt*, 529 U.S. 728, 739 (2000); *AT&T* v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999). The decision below warrants this Court's review under each of these criteria. And this Court has many times recognized the importance of resolving unsettled questions about the construction and application of the Clean Water Act.[8]

An early and definitive ruling by the Court is especially warranted in this case because the decision below has confused the established statutory line between Federal and State regulation of water pollution. Many of the affected waters flow through more than one State. Only this Court can establish a clear national rule as to whether EPA may mandate § 303(d)(1) TMDLs for waters impaired solely by nonpoint sources. A uniform understanding of the Clean Water Act's allocation of federal-state responsibilities is critical to delineating permissible uses of land and water in all 50 States.

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[8] *E.g.*, *Borden Ranch P'ship* v. *United States Army Corps of Eng'rs*, 123 S. Ct. 599 (2002); *Solid Waste Agency* v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Friends of the Earth, Inc.* v. *Laidlaw Envt'l Servs., Inc.*, 528 U.S. 167 (2000); *PUD No. 1* v. *Washington Dep't of Ecology*, 511 U.S. 700 (1994); *Arkansas* v. *Oklahoma EPA*, 503 U.S. 91 (1992); *Gwaltney, Ltd.* v. *Chesapeake Bay Found.*, 484 U.S. 49 (1987); *International Paper Co.* v. *Ouelette*, 479 U.S. 481 (1987); *Chemical Mfrs. Ass'n* v. *NRDC*, 470 U.S. 116 (1985); *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981); *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977); *EPA* v. *California*, 426 U.S. 200 (1976); *Train* v. *Colorado Public Interest Group*, 426 U.S. 1 (1976); *Train* v. *Campaign Clean Water, Inc.*, 420 U.S. 136 (1975).

This is no small matter. EPA's position, as sustained below, will require at least 40,000 TMDLs over the next decade.[9] Developing these TMDLs will cost the States over $1 billion, most of which will come from public funds.[10] Roughly half of these TMDLs will be directed to waters impaired only by nonpoint sources.[11] As the National Governors Association wrote to President Clinton on July 6, 2000, the "states simply do not have the enormous resources necessary to accomplish such a task."[12] Complying with these comprehensive, novel, and federally imposed land use mandates also will impose incalculable costs on private landowners. As the record in this case shows, the Garcia River TMDL alone imposed over $10 million in costs on just one landowner. See App., *infra*, 11a. And as petitioners Guido and Betty Pronsolino discovered, such TMDLs force landowners to make deep and costly cutbacks in land use activities to compensate for background sediment loadings over which they often have no control. A dispositive ruling

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[9] See EPA, Notice of Request for Comments on State, Regulated Community, and Small Business Cost Resulting from the TMDL Program, 65 Fed. Reg. 75699, 75700 (2000).

[10] See EPA, *Fact Sheet on "The National Costs of the Total Maximum Daily Load Program (Draft Report),"* http://www.epa.gov/owow/tmdl/coststudy/costfact.html.

[11] See EPA, *Federal Appeals Court Upholds Landmark Clean Water Decision*, Region 9 News Release (June 3, 2002), http://www.epa.gov/owow/tmdl/lawsuit.html ("54 percent of California's impaired waterways are polluted by non-point sources exclusively"); EPA, *Overview of the Total Maximum Daily Load Program*, http://www.epa.gov/owow/tmdl/tptmdl (43% of waters nationwide on 1998 § 303(d)(1) lists are impaired solely by nonpoint sources).

[12] Available at http://www.nga.org/nga/legislativeUpdate/1,1169, C_LETTER%5ED_1077,00.html.

by this Court is needed to prevent such an enormous and needless waste of resources.

Recent events underscore the urgent need for review of the decision below. In 1999, EPA proposed a new rule to formalize its position that § 303(d)(1) applies to waters impaired only by nonpoint sources. In doing so, EPA effectively recognized that its longstanding TMDL regulations, enacted in 1985, are out of step with its current position. See Proposed Revisions to the Water Quality Planning and Management Regulation, 64 Fed. Reg. 46012 (Aug. 23, 1999). EPA was widely criticized for seeking to effect this change without seeking Congressional authorization. See Susan Bruninga, *House Panel Members Question EPA Authority to Issue TMDL Proposal*, 30 Env't Rep. (BNA) 1241, 1242 (Nov. 5, 1999). Responding to this criticism, Congress passed H.R. 4425 in June 2000 to block funding for implementation of EPA's proposed rule. EPA sought to avoid that legislation by publishing its rule in the Federal Register just hours before President Clinton signed H.R. 4425 into law (as P.L. 106-246). In the face of litigation challenging the validity of the new rule, EPA first delayed its effective date and then withdrew it. See Withdrawal of Revisions to the Water Quality Planning and Management Regulation, 67 Fed. Reg. 79020 (Dec. 27, 2002).

That withdrawal does not reflect any pullback from EPA's application of § 303(d)(1) to waters impaired only by nonpoint sources. See 67 Fed. Reg. at 79026 ("EPA anticipates no reduction in the pace of TMDLs being developed"). Rather, EPA now intends to rely on the decision below to implement its TMDL program—and thereby bypass Congress and the litigation that its aggressive new rule had provoked. This recent history confirms EPA's refusal to abide by the statutory text and underscores the vital need for this Court's intervention. Only Congress, not EPA or the Ninth Circuit, may amend the Clean Water Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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